Supreme Court, U.S.
FILED
MAY 5 1998
CLERK

No. 97-889

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

CEASAR WRIGHT,
Petitioner,
v.

UNIVERSAL MARITIME SERVICE CORP.;
STEVENS SHIPPING & TERMINAL COMPANY;
STEVEDORING SERVICES OF AMERICA;
RYAN-WALSH, INC.;
STRACHAN SHIPPING COMPANY;
CERES MARINE TERMINALS, INC.; and
SOUTH CAROLINA STEVEDORES ASSOCIATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ACADEMY OF ARBITRATORS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST AND CONCERN OF THE AMICUS	1
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. UNLIKE THE ISSUE IN OTHER RELATED CASES, THE ISSUE IN THIS CASE IS THE PROPER FUNCTION OF A COURT IN INTERPRETING THE ARBITRATION PROVIION OF A COLLECTIVE BARGAINING AGREEMENT WHEN A CLAIMANT BRINGS SUIT FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE	5
II. WHEN THE ARBITRATION PROVISION IN A COLLECTIVE AGREEMENT IS URGED AS A BAR TO DIRECT SUIT BY AN EMPLOYEE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE THE PRESUMPTION OF ARBITRABILITY IS INAPPLICABLE	8
III. WHETHER A COLLECTIVE BARGAINING AGREEMENT CAN WAIVE AN EMPLOYEE'S RIGHT TO SUE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE NEED NOT BE DECIDED UNLESS A COURT FIRST FINDS THAT THE AGREEMENT MAKES SUCH CLAIMS ARBITRABLE AND A COURT SHOULD NOT SO FIND UNLESS THE AGREEMENT EXPLICITLY SO PROVIDES	12
CONCLUSION	15

TABLE OF AUTHORITIES

Cases Page

Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) ..... 6, *passim*
American Manufacturing, 363 U.S. 564 (1960) 11
Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962) 11
AT&T Technologies v. Communications Workers, 475 U.S. 643 (1986) 11, 14
Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996) *cert. denied*, 117 S. Ct. 432 (1996) ..... 7, *passim*
Drake Bakeries Local 50, 370 U.S. 254 (1962) 11
Duffield v. Robertson Stephens & Co., No. 97-15698 6
First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938 (1995) 5, 12, 14
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 6
LaChance v. Northwest Publishing, Inc., 965 Supp. 177 (D. Mass. 1997) 6
Pryner v. Tractor Supply Co., 109 F.3d 354 (7th Cir. 1997) *cert. denied* 118 S. Ct. 294 (1997) ..7, *passim*
Republic Steel Co. v. Maddox, 379 U.S. 650 (1965) ..... 7, *passim*
Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 965 F. Supp. 797 (D. Mass. 1997) 6
Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) ..... 6, *passim*

Statutes

Labor Management Relations Act, 1947 § 301, 29 U.S.C. 185 6
Federal Arbitration Act, 9 U.S.C. §§ 1-16 6

Other Authoriites

Abernethy, *The Presidential Address*, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 13 2

TABLE OF AUTHORITIES—Continued

Page

Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 756 (1960) .. 8
St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at *Enterprise Wheel* and its Progeny, 75 Mich. L. Rev. 1137, 1138-40 (1977) 9

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INTEREST AND CONCERN OF THE AMICUS [1]

The National Academy of Arbitrators, founded in 1947, is a professional organization of neutrals. Candidates for membership must be elected by a two-thirds vote of the

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[1] Rule 37.6 statement: Counsel of record is the author if this brief. No person or entity other than the National Academy of Arbitrators has made any monetary contribution to the preparation or submission of this brief.

members at its annual meetings after careful consideration of their qualifications by its membership Committee. To be considered for membership an arbitrator must demonstrate acceptability by management and labor through substantial and current experience as impartial arbitrator of labor-management disputes (at a bare minimum 50 cases within 5 years with a variety of parties) or, as an exception, have obtained general recognition through scholarly publication or other activities as an impartial authority in labor-management relationships. Members are prohibited from serving as advocates for either labor or management. Currently the Academy has 651 American and Canadian members.

The Academy's principal purposes, set out in its constitution are "to establish and foster the highest standards of integrity, competence, honor and character among those engaged in the arbitration of labor-management and employment disputes on a professional basis; to secure the acceptance of and adherence to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes . . .; to promote the study and understanding of arbitration of labor-management and employment disputes." Its function was best described by its president in 1983:

> "The dominant commitment of this Academy throughout its history has been to the advancement of arbitration, not to the advancement of arbitrators. That essential ingredient of true professionalism, a keen and controlling sense of social responsibility—a sense of social responsibility for advancing desirable goals lying outside and beyond one's personal or group interests—has motivated this Academy and its dedicated and committed leadership throughout its history.[2]

[2] Abernethy, *The Presidential Address*, in Arbitration, Promise and Performance, Proceedings of the 36th Annual Meeting, National Academy of Arbitrators (1984) 13.

The Academy is the co-author and principal enforcer of an ethical code, the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes, that has been adopted by the American Arbitration Association and the Federal Mediation and Conciliation Service. The proceedings of the annual meeting of the Academy are published by the Bureau of National Affairs and constitute the most authoritative collection in existence of materials in the labor arbitration process.

The traditional function of labor arbitration was to resolve disputes between management and labor primarily involving questions of interpretation and application of the terms of collective bargaining agreements (grievance arbitration) but also at times involving questions as to what the terms and conditions of new agreements should be (interest arbitration). Arbitration of disputes as to the application and interpretation of statutes protecting individual employees against specified forms of employment discrimination was not traditionally a function of labor arbitration. Recognizing that such arbitration has, however, become part of the American landscape the Academy has amended its constitution and by-laws to encompass study and educational activity with respect to employment arbitration, although it has continued to limit its membership to those accomplished in traditional grievance arbitration.

The Academy's interest in this case is in protecting the status and respect which the institution of grievance arbitration has achieved. It may seem odd that arbitrators should object to a decision which enlarges their jurisdiction to cover disputes not only as to the interpretation and application of the terms of collective agreements but also statutes. We in fact have no objection to such enlargement if it is genuinely the intention of the parties to confer that jurisdiction. Arbitrators under collective bargaining agreements are usually willing to decide what-

ever disputes the parties submit to them. In the present case, however, as well as in a number of related cases, arbitration is not being invoked by the parties to a collective bargaining agreement in order to get a statutory dispute resolved. It is being invoked as a defense against adjudication of a claim by an individual in the absence of any evidence that the parties to the collective bargaining agreement intended that such claims be arbitrated.

In these cases the courts, we believe, are erroneously applying a presumption of arbitrability, sometimes without saying so in a context in which it is inapplicable. In so doing they have converted arbitration, which has been recognized as a relatively efficient and efficacious method of protecting individual employees, into an obstacle that prevents employees from vindicating their rights. Because we believe that such decisions tarnish and diminish, rather than augment, the labor arbitration process we submit this brief in support of the petitioner.

The parties have consented to the filing of this amicus brief. Their letters have been filed with the clerk.

SUMMARY OF ARGUMENT

Although the issue in this case is related to the cases in conflict that were presented by the petition for certiorari, it is different. The issue directly involved is the proper function of a court in interpreting the arbitration provision in a collective bargaining agreement when it is urged as a bar to a suit claiming a violation of an anti-discrimination statute.

The courts below in this case correctly assumed that they should determine arbitrability of the statutory claim but leapt to an inference, based on the lack of the usual language limiting the arbitrator to interpretation and application of the collective bargaining agreement, that every public law question was arbitrable under the agreement. In so doing they implicitly applied the presumption

of arbitrability in Section 301 cases that is applicable where the contestants are labor and management. That presumption is inapplicable where the availability of arbitration is raised as a bar to the prosecution of a suit to vindicate employee statutory protections against discrimination.

The appropriate presumption is the obverse: In such a suit the correct rule is that of *First Options of Chicago, Inc. v. Kaplan*. A court should not conclude that the parties to a collective agreement agreed to arbitrate public law disputes so as to bar direct suit by a plaintiff unless there is clear and unmistakable evidence that they intended to vest power in the arbitrator to decide such disputes.

Such a rule resolves this case and, as well, those cases in which courts have assumed that the plaintiff's claim was arbitrable but then went on to differ as to whether, that being so, recourse must be had to the arbitration procedure. Unless the rule we propose is adopted and the decision of the court below reversed the status of grievance arbitration as a useful instrument in preventing industrial strife and protecting employee rights will be diminished, not enhanced.

ARGUMENT

I. UNLIKE THE ISSUE IN OTHER RELATED CASES, THE ISSUE IN THIS CASE IS THE PROPER FUNCTION OF A COURT IN INTERPRETING THE ARBITRATION PROVISION OF A COLLECTIVE BARGAINING AGREEMENT WHEN A CLAIMANT BRINGS SUIT FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE.

Before stating our views on the issue before the Court it is important to carefully define that issue. The first step in that definition is to describe the relationship between the issue in this case and other cases involving the arbitration of employee statutory claims.

1. This case is *not* about the applicability of the Federal Arbitration Act decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), to the Americans With Disabilities Act or Title VII. There are serious questions about the applicability of *Gilmer* to the ADA and Title VII under the FAA. See the opinions of the United States District Court for Massachusetts in *LaChance v. Northwest Publishing, Inc.*, 965 Supp. 177 (D. Mass. 1997) and *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 797 (D. Mass. 1997) and 76 FEP Cases 681 (1998).[3]

The Court need not address those questions in this case because it involves grievance arbitration under Section 301 of the Labor Management Relations Act of 1947. Although both the FAA and Section 301 involve arbitration, different considerations apply under the two statutes. Arbitration under Section 301, as this Court has recognized, is a substitute for the strike as a method of resolving disputes as to the proper application of a collective bargaining agreement. Arbitration under the Federal Arbitration Act, to the contrary, is a substitute for litigation. Different considerations apply in determining whether arbitration can be compelled where the alternative is litigation, as in *Gilmer*, than are applicable where, as in *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), the arbitration provision is a substitute for the strike.

2. The issue in this case is related to, but is not exactly the same as, the question decided in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). The issue there was

[3] With respect to individual agreements, the Academy has adopted a statement of policy opposing mandatory arbitration as a condition of employment when it requires waiver of direct access to a judicial forum. The Academy has also filed an amicus brief in a pending case in the Ninth Circuit, *Duffield v. Robertson Stephens & Co.*, No. 97-15698, opposing enforcement of the arbitration requirement in a stock exchange registration form in a suit brought under Title VII. None of those issue need be addressed in this case.

whether an arbitration decision finding no violation of the no-discrimination clause in a collective bargaining agreement prevented a plaintiff from pursuing his claim that there had been a violation of the anti-discrimination provisions of Title VII. This Court held that the decision on the contractual claim did not bar a law suit on the claim of statutory violation, even though the facts bearing on the two claims might be the same. "[A] contractual right to submit a claim to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination. Both rights have legally independent origins. . . . Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII." 415 U.S. at 52-53. Alexander did not have two bites at the apple. He had two apples. The Fourth Circuit in this case held that Ceasar Wright had only one apple, the collective bargaining agreement.

3. Nor is the issue in this case exactly the same as, although it is related to, the issue on which the courts of appeal are divided in such cases as *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996), *cert. denied*, 117 S. Ct. 432 (1996); *Pryner v. Tractor Supply Co.*, 109 F.3d 354 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 294 (1997), and the other cases listed on page 10 of the petition for certiorari in this case, which will hereinafter be referred to as the *Austin-Pryner* conflict. Those cases, unlike *Gilmer*, did arise under Section 301 and did involve collective bargaining rather than commercial agreements. But the issue in those cases was whether a non-discrimination clause in a collective bargaining agreement should be read as incorporating into the agreement by reference the federal law prohibiting discrimination, thus bringing into play the rule of *Republic Steel Co. v. Maddox*, 379 U.S. 650 (1965): a claim of violation of a provision in a collective bargain-

ing agreement providing for arbitration must be arbitrated rather than sued on. There isn't any discrimination provision in the contract in this case. Nor did the courts below in this case even purport to require arbitration of petitioners claim under the Americans With Disabilities Act because the agreement incorporated it by reference, as was the case in *Austin*. They relied, rather, on the arbitration provision. The arbitration clause, the Court of Appeals held, covered all disputes affecting wages, hours and other terms and conditions of employment and, hence, covered a dispute arising under the ADA even if not incorporated in the agreement. The real issue in this case, then, is as to the proper function of a court in interpreting the arbitration provision in a collective bargaining agreement, when it is urged as a bar to a suit claiming a violation of an anti-discrimination statute.

II. WHEN THE ARBITRATION PROVISION IN A COLLECTIVE AGREEMENT IS URGED AS A BAR TO DIRECT SUIT BY AN EMPLOYEE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE THE PRESUMPTION OF ARBITRABILITY IS INAPPLICABLE.

The agreement in this case is atypical. Most American collective bargaining agreements, like the agreements involved in *Gardner-Denver* and in the *Austin-Pryner* conflict, give an arbitrator the authority only to interpret and apply the provisions of the collective bargaining agreement. Many agreements do, indeed, make all disputes eligible for processing in the grievance procedure. But, they usually expressly limit arbitration to disputes involving the interpretation or application of the collective bargaining agreement.[4] The arbitrator, as this Court has said in *Gardner-Denver*, is "the proctor of the bargain . . . His source of authority is the collective bargaining agreement,

[4] Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 756 (1960).

and he must interpret and apply that agreement. . . ." 415 U.S. at 53. Or, as the then Dean of the University of Michigan Law School put it, the arbitrator is the parties' "contract reader."[5]

In this case there is no explicit limitation in the arbitration provision. The agreement says that "matters under dispute" not settled in the grievance procedure are to be submitted to arbitration. J.A. 43a. This provision, when coupled with the statement in the agreement that it is intended to cover all matters affecting "wages, hours and other terms and conditions of employment" was read by the Court of Appeals to encompass any claim of violation of public law dealing with wages, hours or conditions of employment, even though not dealt with in the agreement, thus precluding suit by the petitioner of his claim of violation of the Americans With Disabilities Act.

This is a breathtaking inference from the absence of an explicit statement of the usual understanding that the arbitrator is confined to questions of interpretation and application of the agreement! How far does that inference reach? If it encompasses claims arising under the Americans with Disabilities Act, does it encompass all public laws? The National Labor Relations Act? If an employer claims that observance of a picket line (permitted under Section 15(A)(1) of the agreement) constitutes a secondary boycott, must the employer submit the claim to arbitration? Does the arbitration provision encompass a claim under South Carolina's Workers' Compensation Act? Should the plaintiff have been required to pursue his compensation claim through arbitration rather than before the Industrial Commission, as he in fact did? And what is the statute of limitations? The grievance procedure, in Section 15(B), says that a grievance must be filed within 48

[5] St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at *Enterprise Wheel* and its Progeny, 75 Mich. L. Rev. 1137, 1138-40 (1977).

hours after "such discussions."[6] Does this mean that the union has waived the two-year period for the filing of an action under the Fair Labor Standards Act or the 180/300-day limitation period in Title VII and, by incorporation, in the Age Discrimination in Employment Act?

The courts below concluded that the petitioner's ADA claim was arbitrable without asking such questions. They leapt to this inference in the absence of testimony from either the employer or the union as to the history of the arbitration provision and as to their past practice under it, or as to whether both parties—who, after all, adopted their agreement in light of *Gardner-Denver*—really intended to give the arbitrator the power not only to apply public laws relating to wages, hours, and conditions of employment, but also to order all of the remedies provided by public law. Indeed, the only evidence before the trial court as to the understanding of the union—the other party to the arbitration provision—was that the union believed that petitioner's claim was not subject to the grievance arbitration provision. The Local President, after protesting the employer's action did not file a grievance but, implicitly recognizing that petitioner's claim of violation of ADA was not subject to arbitration, advised the petitioner to pursue his statutory claim in court.[7]

[6] What discussions? There seems to be no antecedent provision requiring discussions other than the discussions as to the payment of employer assessments, contributions, and other required payments to the "fund" in the preceding Section 15(A)(2). It is possible that the omission of any limitation on the arbitrator's jurisdiction was just as inadvertent as the omission of the provision for prior discussions. Indeed, the entire agreement appears to be a patchwork of provisions some of which were lifted from other agreements and thus are self-contradictory. Thus the agreement provides in section 13(D)(6) that "the Employer also reserves the right to . . . discharge (J.A. 38a) without any limitation as to just cause but then deals in Section 15(A) with "any decision in favor of the employee involving . . . discharge." (J.A. 45a).

[7] That this advice did not reflect any tension between the union and the petitioner is shown by the fact that after the Fourth Circuit's decision in *Austin*, the union did file a grievance on petitioner's behalf. See footnote 1 on page 6 of the petition for certiorari.

The failure of the court below to ask these kinds of questions would have been entirely proper if this were a contest between the union and the employer as to arbitrability. In the usual case in which that is an issue the contestants before the court are the parties to the agreement. In cases brought under Section 301 the parties to the litigation are the employer and the union. In most such cases the union seeks to compel arbitration, as in *American Manufacturing* 363 U.S. 564 (1960) and *Warrior & Gulf*, against the opposition of the employer. In others, such as *Drake Bakeries Local 50*, 370 U.S. 254 (1962) and *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962) the employer seeks damages from the union for breech of the no-strike clause and the union argues that the claim must be arbitrated. In the 301 cases the rule is clear. Unless the parties explicitly provide otherwise, substantive arbitrability is a question for a court, not the arbitrator. *AT&T Technologies v. Communications Workers*, 475 U.S. 643 (1986). But, as this Court held in *Warrior & Gulf*, "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." 363 U.S. at 582-583.

Therein lies the rub—and implicitly the answer. That answer resolves this case and also resolves the *Austin-Pryner* conflict. This suit, unlike those but like *Austin* and *Pryner*, is not a suit between parties to a contract in which the parties disagree as to whether the agreement between them requires arbitration of a dispute. It is a suit brought under an anti-discrimination statute by an employee against the employer in which the employer alone asserts that the agreement with the union requires that the claim be arbitrated by the union. In that kind of

a case, we submit, the Section 301 rules about substantive arbitrability are simply inapplicable. The applicable principle is not found in *Warrior & Gulf*, but in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), as we demonstrate below. First, however, it is important to distinguish between our contention and the rationale of the decisions that have relied on, or distinguished, *Alexander v. Gardner-Denver*.

III. WHETHER A COLLECTIVE BARGAINING AGREEMENT CAN WAIVE AN EMPLOYEE'S RIGHT TO SUE FOR VIOLATION OF AN ANTI-DISCRIMINATION STATUTE NEED NOT BE DECIDED UNLESS A COURT FIRST FINDS THAT THE AGREEMENT MAKES SUCH CLAIMS ARBITRABLE AND A COURT SHOULD NOT SO FIND UNLESS THE AGREEMENT EXPLICITLY SO PROVIDES.

One possible answer to the question posed in this case and, as well as in the *Austin-Pryner* conflict, is that even if a collective bargaining agreement specifically incorporates a public law such as the ADA or Title VII it cannot waive an individual employee's right to resort directly to the judicial remedy provided by the statute. That, as we read them, is the rationale of the cases on the *Pryner* side of the *Pryner-Austin* conflict. They read *Gardner-Denver* as requiring that result. The Fourth Circuit disagreed on that issue in *Austin* and, implicitly, in this case. For the reasons set forth earlier, we do not believe that *Gardner-Denver* is the dispositive case. It simply decided that the result of an arbitration decision as to a no-discrimination contractual claim did not bar an employee from seeking to enforce a statutory prohibition. Only in a footnote did the opinion indicate, as a "further concern" that there might be tension between the employee's interest and that of the union.[8]

The critical issue in these cases as well as in the present case—the focal question—should be: Does the particular

[8] 415 U.S. at 58, fn. 19.

collective bargaining agreement authorize an arbitrator to interpret and apply the public law that the employee seeks to enforce and authorize the arbitrator to provide the remedies provided by the statute? Antecedent to that focal question is the issue of who is to decide it and what principle is to govern the decision. Only if there is an affirmative answer to the focal question is it necessary to reach the posterior issue, dealt with in *Pryner* and similar cases: whether that authorization bars the plaintiff from directly using the forum provided by the statute involved.

A collective agreement may, of course, explicitly incorporate a statute and explicitly provide for arbitration of a claim arising under a statute. An example is the contract provision proposed in 1975 by the then General Counsel of the International Union of Electrical Workers expressly giving the arbitrator under a collective bargaining agreement the authority to apply Title VII and other anti-discrimination laws and, as well, the authority to award any remedy which could be granted by a court, including such changes in the agreement as necessary to comply with the statutes.[9] Where there is such a provision the answer to the focal question is "yes." If there is doubt about it a court should resolve it. Only if there is an affirmative answer does the question then arise as to whether the court should apply the rule of *Republic Steel v. Maddox* so as to require an employee to arbitrate or, instead, should rely on *Gardner-Denver* for the opposite result.

There is no explicit incorporation of statutory law in this case. The arbitration provision is ambiguous. The real issue therefore is as to the antecedent question: the standard a court should apply in determining whether the collective agreement is intended to make statutory issues

[9] Newman, *Post-Gardner Developments in the Arbitration of Discrimination Claims*, in Arbitration—1975, Proceedings of the 28th Annual Meeting of the National Academy of Arbitrators (BNA, 1976) 57.

arbitrable so as to bring into question the *Maddox* principle. The correct rule, we believe, and the one which we urge the Court to adopt, is the precise opposite of the presumption of substantive arbitrability for labor disputes which this Court announced in *Steelworkers v. Warrior & Gulf*. That presumption is simply not applicable where the dispute is not between the parties to a collective agreement over the interpretation of the substantive provisions of their agreement but is, rather, a dispute between an employee and an employer as to the application of a public law forbidding discrimination.

In *Warrior & Gulf*, this Court, in announcing the presumption of arbitrability under Section 301 said in justification of its conclusion: "The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of the courts." 363 U.S. at 581. And as the Court repeated in *AT&T Technologies, Inc. v. Communications Workers of America*, the "presumption or arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective bargaining agreements." 475 U.S. at 650. That presumption is simply inapplicable where the question is not the interpretation of the substantive provision of a collective bargaining agreement but the interpretation and application of a statute. Applying statutory law, not the collective agreement or the common law of the shop, is not the normal practice of labor arbitrators and they are not normally chosen for their expertise in the law. Indeed many of them are not lawyers.

When it is contended that a claimant under an anti-discrimination statute is barred from suing because he is required to arbitrate under a collective bargaining agreement, the appropriate principle is that announced by the Court in dealing with a similar question: whether an agreement should be read as giving an arbitrator the authority to decide arbitrability. "Courts should not assume that the parties agreed to arbitrate arbitrability unless

there is 'clear and unmistakable' evidence that they did so." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. at 944. Paraphrasing that statement, in cases brought under an anti-discrimination statute courts should not assume that the parties to a collective bargaining agreement agreed to arbitrate public law issues unless there is clear and unmistakable evidence that they did so.

In *First Options* this Court said that courts should "hesitate to interpret silence or ambiguity in 'who should decide arbitrability' as giving arbitrators that power, for doing so might often force unwilling parties to arbitrate a matter they reasonably would have thought a judge, not an arbitrator, would decide." 514 U.S. at 945. This is even more true when the question of arbitrability of a statutory claim is raised as a defense in an employee's suit because the consequence is not arbitration at all but, as in this case, the death of the claim because the time for filing a grievance has expired.

As labor arbitrators we are obviously interested in protecting and advancing the institution of grievance arbitration. We believe that it has served the interests of unions, employers and employees as an efficacious method of resolving workplace disputes and avoiding industrial strife. We also believe that a decision such as the one below does not advance the cause of grievance arbitration but, rather, diminishes it. We urge the Court to adopt the principle suggested in this brief to avoid that result.

CONCLUSION

For the reasons set forth, we urge the Court to reverse the decision below and to declare that, in suits brought by employees to enforce statutory protections, collective bargaining agreements should not be found to require arbitration of such claims unless they clearly and explicitly so provide.

Respectfully submitted,

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